FILE COPY

No. 679

In the Supreme Court of the United States

October Term, 1952

[redacted]

v.

J. T. Ross, Commissioner of Internal Revenue, and Director of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 675

GEORGE MOORE ICE CREAM COMPANY, INC.,
petitioner

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR
the District of Georgia

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case because:

1. The question whether protest was a necessary condition precedent to recovery (turning upon whether the amendment to Section 3226 of the Revised Statutes made by Section 1014 of the Revenue Act of 1924 was retroactive) is involved in *Arthur C. Harvey Co.* v. *John F. Malley and/or Malcolm E. Nichols, Former Collectors,* No. 537, October Term, 1932, now pending after argument.

2. The question as to the right of the petitioner to amend its claim for refund after expiration of the statute of limitations is raised by this record on demurrer. The original claim for refund was attached to the complaint in the District Court, but the amendments were not set forth. The complaint, however, alleged that detailed statements constituting amendments to the claim were filed. (R. 4.) In view of the recent decisions of this Court in *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932, and *United States* v. *Memphis Oil Co.*, No. 308, October Term, 1932, both decided January 9, 1933, while we contend that a claim for refund based upon specific items may not be amended after the expiration of the period of limitation so as to claim different items, we believe that question is not properly presented by this record because the allegations in the complaint appear to be sufficient on demurrer, at least with respect to the items of invested capital, and that the demurrer should therefore have been overruled. Until the allegations have been supported by proof, it is impossible to ascertain whether under the decisions of this Court in the *Factors & Finance Co.* and *Memphis Oil Co. cases* the taxpayer is entitled to recover, and, if so, how much.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

MARCH, 1933.

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